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7 [REDACTED] and
[REDACTED]

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 [REDACTED] and [REDACTED]
12 [REDACTED] on behalf of themselves and the
State of California,

13 Plaintiffs,

14 vs.

15 INTERSEC INTERACTIVE, INC., and
16 DOES 1–25,

17 Defendants,

Case No. 15-CV-01145

**FIRST AMENDED COMPLAINT FOR
UNPAID OVERTIME AND
WHISTLEBLOWER RETALIATION**

DEMAND FOR JURY TRIAL

18
19 Plaintiffs [REDACTED] and [REDACTED] on behalf of themselves and the State
20 of California, bring this action against Defendant Intersec Interactive, Inc. (“Intersec” or
21 “Defendant”), and Does 1–25 (collectively “Defendants”), and allege as follows. This First
22 Amended Complaint is filed as a matter of right pursuant to Federal Rules of Civil
23 Procedure, rule 15(a)(1)(B) and California Labor Code section 2699.3(a)(2)(C).

24 ///

PARTIES

1. Plaintiffs were, at all relevant times herein, residents of the State of California and employed by Defendants to work for Defendant in Oakland California.

2. Defendant Intersec Interactive, Inc. is a New York corporation that owns and operates a pornography business in Oakland California.

3. Plaintiffs do not know the true names and capacities of defendants sued herein as DOES 1–25 and therefore sue these defendants by such fictitious names. Plaintiffs will amend this Complaint to allege their true identity and capacities when ascertained. Plaintiffs are informed and believe, and on that basis allege, that each of these fictitiously named defendants is responsible in some manner for the occurrences alleged herein and thereby proximately caused Plaintiffs' injuries alleged herein.

4. Plaintiffs are informed and believe, and on that basis allege, that, at all relevant times, each of the defendants was the agent or employee of each of the remaining defendants, and, in doing the things herein alleged was acting within the course and scope of such employment, and that Defendants authorized ratified, and approved, expressly or implicitly, all of the conduct alleged herein.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the parties and claims involved in this action pursuant to United States Code, title 28, section 1332 because Plaintiffs, on the one hand, and Defendant, on the other, are citizens of different states and the amount in controversy exceeds \$75,000.

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to Plaintiffs' claims occurred in the federal Northern District of California.

FACTUAL ALLEGATIONS

7. Plaintiffs [REDACTED] and [REDACTED] worked on and off for Defendants for a number of years. Most recently, [REDACTED] started working for Defendants in or about October 2011, and [REDACTED] started working for Defendants in or about October 2012. [REDACTED] and [REDACTED] worked continuously for Defendants until October 19, 2014 and February 2014, respectively.

8. Although there were no official job titles at Intersec, [REDACTED] was essentially a General Manager, managing the production and presentation of content on Intersec's various websites. [REDACTED] was primarily a producer responsible for filming and editing new content. Additionally, in the spring of 2014, [REDACTED] became responsible for managing the Topgrl site. Both [REDACTED] and [REDACTED] performed a variety of tasks outside their typical role as the job required, and they were both on camera performers.

9. While Defendants classified [REDACTED] [REDACTED] and each of Defendants' other workers as independent contractors, in reality each of these workers were all employees and entitled to all of the benefits attendant to that status, including the payment of overtime compensation.

10. The test for whether a worker is an independent contractor or an employee is whether the employer has the right to control the manner and means of the worker's performance. *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 349–351. A number of different factors contribute to the extent of control that an employer exercises over its workers: (1) the right to discharge at will, without cause; (2) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (3) the length of time for which the services are to be performed; (4) the method of payment, whether by the time or by the job; (5) whether the

1 one performing services is engaged in a distinct occupation or business; and (6) whether or
2 not the work is part of the regular business of the principal. *Id.*

3 11. In [REDACTED] and [REDACTED] case, each of the foregoing factors resolve in favor of
4 employee status. They were expected to be at work at a specific time and specific place
5 every day. They used Intersec's tools—e.g. office space, cameras, computers, software,
6 props, etc. Their employment with the company was open-ended, but they could be
7 terminated at will, without cause. They were not engaged in their own distinct occupation
8 or business. Rather, they performed a variety of tasks, all of which were part and parcel of
9 Intersec's regular business. Based on the *Borello* test, [REDACTED] and [REDACTED] were clearly
10 employees. This same analysis applies equally to the other workers at Intersec.

11 12. Since Defendants misclassified Plaintiffs and other employees as independent
12 contractors, they did not require them to clock in and out of work and did not require them
13 to otherwise track their hours. At some point Defendants instructed Plaintiffs and other
14 employees to submit timesheets, but they made it clear that employees were only
15 supposed to record the pre-determined number of hours and days for which Defendants
16 intended to pay them. Defendants made it clear that they were not interested in the actual
17 number of hours or days employees worked. Defendants instructed Plaintiffs and other
18 employees to just indicate 8 hours per day, 5 days per week. Thus, Plaintiffs and other
19 employees would simply indicate "8 hours", for example, even if they worked 12 hours, and
20 they would only bill for 5 days a week even if they worked 6 or 7. Defendants would only
21 compensate Plaintiffs and other employees for the 8 hours, 5 days per week, irrespective of
22 the employees' actual hours or days spent working. Defendants did not compensate
23 Plaintiffs and other employees for any hours worked over their "standard", pre-determined
24 number of hours.

1 13. Both [REDACTED] and [REDACTED] worked an immense amount of overtime during the
2 summers. They would typically work 4 to 7 days per week, 10 to 12 hours per day.
3 Throughout the rest of the year, [REDACTED] averaged between 45 and 50 hours per week.
4 Other workers worked about the same amount of overtime as [REDACTED] and [REDACTED] if not
5 more. There are about 10 other employees over the past year who are similarly aggrieved
6 and entitled to unpaid wages.

7 14. In addition to her wage-and-hour claims, Plaintiff [REDACTED] has a claim for wrongful
8 termination based on the fact that Defendants terminated her employment because she
9 reported to Intersec's primary owner, [REDACTED] [REDACTED] that co-owner Daniel Intraub was
10 engaging in pedophiliac activity.

11 15. Intraub told [REDACTED] that he was in a sexual relationship with a minor. Intraub stated
12 that the minor's parents had discovered their relationship and prohibited the minor from
13 further interaction with Intraub. Yet, Intraub insisted on continuing the relationship and
14 revealed that he had already gone to visit the minor in person in New York City.

15 16. [REDACTED] [REDACTED] girlfriend, was present for that conversation, which took
16 place at a Japanese restaurant, TUNA, in upstate New York. [REDACTED] objected to Intraub's
17 pedophiliac activity, but Intraub insisted that he was going to continue seeing the minor.
18 [REDACTED] then filed a complaint online with the FBI. In addition, she brought the issue to
19 [REDACTED] attention on October 17, 2014 and told [REDACTED] that she had filed a complaint with the
20 FBI. [REDACTED] told [REDACTED] that "This is definitely a problem," and indicated that he would speak
21 with his attorney about the situation. [REDACTED] was also present for that conversation, and
22 she confirmed Intraub's admission of pedophilia.

23 17. That was not the first time that [REDACTED] complained to [REDACTED] about Intraub. [REDACTED] had
24 previously complained to [REDACTED] several times about Intraub and his sexually improper

1 behavior. For example [REDACTED] had complained to [REDACTED] about Intraub taking non-
 2 consensual photographs of other employees' privates while at work. She also complained
 3 to [REDACTED] about the fact that Intraub installed cameras and microphones throughout the
 4 workplace, including the bathroom. Yet, [REDACTED] failed to take any action to remedy these
 5 clearly inappropriate circumstances.

6 18. The same was true with respect to [REDACTED] complaint of Intraub's pedophiliac
 7 activity. Instead of doing anything to address the pedophilia issue, [REDACTED] sent out an email
 8 on October 19, 2014 explicitly condemning [REDACTED] for even raising the issue. In the same
 9 email, [REDACTED] terminated [REDACTED] employment. In fact, [REDACTED] terminated everyone's
 10 employment and required everyone to interview with Intraub in order to maintain their jobs.
 11 Thus, given the circumstances—namely that [REDACTED] complained about Intraub being a
 12 pedophile, and [REDACTED] condemned her for that—[REDACTED] effectively singled out [REDACTED] for
 13 termination.

14 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

15 19. Pursuant to the Private Attorneys General Act of 2004 (Lab. Code § 2698 *et seq.*)
 16 ("PAGA"), Plaintiffs bring this action as a representative law enforcement action on behalf
 17 of The State of California.

18 20. "PAGA Members" include:

19 Persons who worked for Defendants as non-exempt, hourly-wage
 20 employees any time during the one year plus thirty-three days prior to the
 21 filing of this First Amended Complaint ("FAC") until final judgment is
 22 entered.

23 21. Plaintiffs and the PAGA Members are similarly situated in that they have
 24 substantially similar job requirements, duties, and pay provisions, and are subject to
 Defendant's practice, policy, or plan of unlawfully refusing to pay straight time and overtime

1 compensation, failing to provide itemized, accurate wage statements, and failing to pay all
2 earned wages upon termination.

3 22. Plaintiffs have exhausted the administrative requirements of Lab. Code § 2699.3 by
4 notifying the Labor and Workforce Development Agency ("LWDA") and Defendant via
5 certified mail of the specific provisions of the Labor Code that Defendant violated including
6 the facts and theories to support the violation. Thirty-three days have elapsed since
7 Plaintiffs mailed such notice, and the LWDA has not responded.

8 **FIRST CAUSE OF ACTION**

9 **Unpaid Wages
(Individual Claim)**

10 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
11 herein below.

12 23. Defendants' conduct, as alleged herein, constitutes a violation of Cal. Lab. Code §
13 204, which requires employers to pay to its employees all wages due on a semi-monthly
14 basis.

15 24. Defendants knowingly and intentionally refused to pay Plaintiffs straight time
16 compensation for hours worked over eight per day and forty per week.

17 25. As a direct result of Defendants' unlawful employment practices, as alleged herein,
18 Plaintiffs have been injured and are entitled to unpaid wages and interest.

19 **SECOND CAUSE OF ACTION**
20 **Failure to Pay Overtime Compensation**
(Individual Claim)

21 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
22 herein below.

23 26. Defendants' conduct, as alleged herein, constitutes a violation of Cal. Lab. Code §
24 510 and IWC Wage Order No. 5, which require employers to pay overtime compensation to

1 its employees for hours worked over eight per day and forty per week.

2 27. Defendants knowingly and intentionally refused to pay Plaintiff overtime
3 compensation for hours worked over eight per day and forty per week.

4 28. As a direct result of Defendants' unlawful employment practices, as alleged herein,
5 Plaintiffs have been injured and are entitled to unpaid overtime wages and interest.

6 **THIRD CAUSE OF ACTION**
7 **Failure to Provide Accurate, Itemized Wage Statements**
8 **(Individual Claim)**

9 Plaintiff [REDACTED] incorporates each of the foregoing paragraphs as though fully set
10 forth herein below.

11 29. Defendants' conduct, as alleged herein, constitutes a violation of Cal. Lab. Code §
12 226(a), which requires employers to provide its employees with accurate itemized wage
13 statements for each pay period. Defendants knowingly and intentionally failed to provide
14 Plaintiff [REDACTED] with accurate, itemized wage statements showing the total hours worked
15 during the pay period, the applicable hourly rate or rates in effect during the pay period, and
16 Defendant's legal name and address.

17 30. As a direct result of Defendants' unlawful employment practices, as alleged herein,
18 Plaintiff [REDACTED] have been injured because they could not promptly and easily determine
19 from their wage statements the total hours worked during the pay period, the applicable
20 hourly rate or rates in effect during the pay period, and Defendant's legal name and
21 address. Plaintiff [REDACTED] is therefore entitled to penalties and attorney's fees under Lab.
22 Code § 226(e).

23 **FOURTH CAUSE OF ACTION**
24 **Waiting Time Penalties**
(Individual Claim)

Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth

herein below.

31. Defendants' conduct, as alleged herein, constitutes a violation of Lab. Code § 201(a), which requires an employer to pay an employee all earned and unpaid wages immediately upon discharge. Defendants wilfully failed to pay Plaintiffs all wages owed upon their termination.

32. As a direct result of Defendants' unlawful employment practices, as alleged herein, Plaintiffs are entitled to penalties under Lab. Code § 203(a).

FIFTH CAUSE OF ACTION
Unfair and Unlawful Business Practices
(Individual Claim)

Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth herein below.

33. Defendants' conduct, as alleged herein, constitutes unfair competition in violation of Bus. & Prof. Code § 17200 *et seq.*, which prohibits unfair business acts and/or practices.

34. As a direct result of Defendants' unfair and unlawful business practices, Plaintiffs have been injured as alleged herein and are entitled to unpaid wages, interest, and attorney's fees.

SIXTH CAUSE OF ACTION
Whistleblower Retaliation
(██████████ Individual Claim)

Plaintiff ██████████ incorporates each of the foregoing paragraphs as though fully set forth herein below.

35. Defendants' conduct, as alleged herein, constitutes whistleblower retaliation in violation of public policy in violation of Lab. Code § 1102.5 and the common law principles expressed in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167.

36. As a direct result of Defendants' unlawful employment practices, as alleged herein,

1 Plaintiff [REDACTED] has suffered lost wages, severe emotional distress, physical pain and
 2 suffering, and injuries, in an amount to be proven at trial.

3 37. Defendants' conduct, as alleged herein, constitutes oppression, fraud, and/or malice
 4 within the meaning of Civ. Code § 3294 in that Defendants' conduct was intended by
 5 Defendants to cause injury to Plaintiff [REDACTED] and/or was committed by Defendants with a
 6 wilful and conscious disregard of the rights of Plaintiff [REDACTED] entitling Plaintiff to an award
 7 of exemplary or punitive damages.

8 **SEVENTH CAUSE OF ACTION**
 9 **Declaratory Relief**
(Individual Claim)

10 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
 11 herein below.

12 38. An actual controversy has arisen between Plaintiffs and Defendants as to their
 13 respective rights, remedies, and obligations with regard to Defendants' unlawful conduct, as
 14 alleged herein.

15 39. Plaintiffs therefore seek a declaratory judgment as to the respective rights, remedies,
 16 and obligations of the parties.

17 **EIGHTH CAUSE OF ACTION**
 18 **§ 2699(f) Civil Penalties**
(PAGA Representative Claim)

19 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
 20 herein below.

21 40. Defendants' failure to pay all wages due to Plaintiffs and the PAGA Members, as
 22 alleged herein, gives rise to civil penalties under Lab. Code § 2699(f), which Plaintiffs and
 23 the PAGA members seek to collect on behalf of the State of California. Additionally,
 24 Plaintiffs and the PAGA members are entitled to attorney's fees and costs pursuant to Lab.

1 Code § 2699(g)(1).

2 **NINTH CAUSE OF ACTION**
 3 **§ 210 Civil Penalties**
(PAGA Representative Claim)

4 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
 5 herein below.

6 41. Defendants' failure to pay all wages due to Plaintiffs and the PAGA Members, as
 7 alleged herein, gives rise to civil penalties under Lab. Code § 210, which Plaintiffs and the
 8 PAGA Members seek to collect on behalf of the State of California. Additionally, Plaintiffs
 9 and the PAGA Members are entitled to attorney's fees and costs pursuant to Lab. Code §
 10 2699(g)(1).

11 **TENTH CAUSE OF ACTION**
 12 **§ 558(a) Civil Penalties**
(PAGA Representative Claim)

13 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
 14 herein below.

15 42. Defendants' failure to pay overtime compensation to Plaintiffs and the PAGA
 16 Members, as alleged herein, gives rise to civil penalties under Lab. Code § 558(a), which
 17 Plaintiffs and the PAGA Members seek to collect on behalf of the State of California.
 18 Additionally, Plaintiffs and the PAGA Members are entitled to attorney's fees and costs
 19 pursuant to Lab. Code § 2699(g)(1).

20 **ELEVENTH CAUSE OF ACTION**
 21 **§ 226.3 Civil Penalties**
(PAGA Representative Claim)

22 Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth
 23 herein below.

24 43. Defendants' failure to provide itemized, accurate wage statements to Plaintiffs and

the PAGA Members, as alleged herein, gives rise to civil penalties under Lab. Code § 226.3, which Plaintiffs and the PAGA Members seek to collect on behalf of the State of California. Additionally, Plaintiffs and the PAGA Members are entitled to attorney's fees and costs pursuant to Lab. Code § 2699(g)(1).

TWELVTH CAUSE OF ACTION
§ 226.8 Civil Penalties
(PAGA Representative Claim)

Plaintiffs incorporate each of the foregoing paragraphs as though fully set forth herein below.

44. Defendants' willful misclassification of Plaintiffs and the PAGA Members, as alleged herein, gives rise to civil penalties under Lab. Code § 226.8, which the Court may assess against Defendants and which Plaintiffs and the PAGA Members seek to collect on behalf of the State of California. Additionally, Plaintiffs and the PAGA Members are entitled to attorney's fees and costs pursuant to Lab. Code § 2699(g)(1).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

1. Designation of this action as a PAGA representative law enforcement action;
2. Designation of Plaintiffs as representatives of the PAGA Members;
3. That the Court order Defendants to pay damages to Plaintiffs to compensate them for unpaid wages, together with interest at the legal rate;
4. That the Court order Defendants to pay damages to Plaintiff [REDACTED] to compensate her for lost wages, together with interest at the legal rate, emotional distress, pain, and suffering;
5. That the Court order Defendants to pay exemplary damages for maliciously retaliating against Plaintiff [REDACTED] as alleged herein;

6. That the Court order Defendants to pay all applicable penalties arising from their unlawful conduct, as alleged herein;

7. That the Court declare Defendants' conduct, as alleged herein, to be unlawful;

8. That the Court order Defendants to pay Plaintiffs' attorney's fees and costs as alleged herein and also pursuant to Code Civ. Proc. § 1021.5;

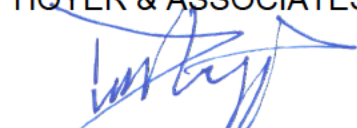
9. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all causes of action and claims with respect to which they have a right to jury trial.

Date: April 16, 2015

HOYER & ASSOCIATES



David C. Lipps
Attorney for Plaintiffs
[REDACTED] and
[REDACTED]